UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JANICE B. UNDERWOOD, Appellant, v. DEPARTMENT OF DEFENSE, Agency.	DOCKET NUMBER SL07529103941I1 DATE: MAR 17 1992

Nathaniel D. Boyd, Memphis, Tennessee, for the appellant.

Emma L. Cole, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency has petitioned for review of an initial decision issued on November 5, 1991, mitigating the appellant's removal to a 90-day suspension. For the reasons set forth below, we GRANT the petition, REVERSE the initial decision, and SUSTAIN the removal. *See* 5 C.F.R. § 1201.115.

BACKGROUND

The facts in this case are not in dispute. The appellant was removed from her WG-5 Material Handler position for attempted theft of two jars of cinnamon. *See* Appeal File

(AF), Subtabs c and g.[1] Prior to the hearing, the appellant admitted to the attempted theft. The remaining issues for resolution were whether the appellant was discriminated against on the basis of her alleged handicap, alcoholism, and whether the removal penalty was appropriate.[2]

The administrative judge found that the appellant had not proven discrimination because she failed to show that she was handicapped. The administrative judge, however, found that the penalty of removal was not reasonable under the circumstances and mitigated it to a 90-day suspension. He considered that the attempted theft was a serious offense, that the deciding official testified that the appellant had been having some performance and misconduct problems during the last two or three years, and that the deciding official testified that she had lost trust and confidence in the appellant. He nonetheless mitigated the penalty, based upon the following factors: (1) The attempted theft was de minimis; (2) the appellant admitted her misconduct, appeared to be remorseful, and was a likely candidate for

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[1] On the morning of June 17, 1991, an eyewitness observed the appellant enter the restroom with two jars of cinnamon in her pockets which, according to the eyewitness, the appellant placed into her purse. Later that day, in the presence of security personnel, the appellant emptied the contents of her purse into a plastic bag known to belong to her. The two jars of cinnamon came from a shipment assigned to the appellant to load. *See* Appeal File, Tab 3, Subtab g.

[2] The appellant had raised a claim that she was treated disparately from other employees regarding the penalty, but she abandoned that claim during the hearing. *See* Hearing Transcript (HT) at 33.

rehabilitation; (3) the appellant had 15 years of service; (4) despite alleged performance and/or misconduct problems, the appellant's performance ratings were fully successful; (5) the 90-day suspension would serve as a deterrent to future misconduct; and (6) in arriving at her decision to remove the appellant, the deciding official had erroneously considered two past disciplinary actions that were not relied on in the notice of proposed removal or in the removal decision. These were: (1) A June 3, 1991, reprimand for failure to comply with standard operating procedures for checking and loading outbound shipments; and (2) a 5-day suspension, beginning December 10, 1991, for the first offense of misuse of a government vehicle (the appellant drove her forklift to the cafeteria). *See* Initial Decision at 4-6; Appeal File, (AF) Tab, Subtabs j-l.

In its petition for review, the agency contends that the administrative judge improperly substituted his judgment for that of the agency deciding official and erred in mitigating the penalty. The agency asserts that the appellant first tried to cover-up the attempted theft and only admitted to it at the pre-hearing conference, that the appellant did not testify that she was remorseful, that the appellant pled guilty to a criminal charge of shoplifting in 1988 and only reluctantly admitted it at the hearing, that the appellant was having performance and misconduct problems, and that the deciding official did not believe the appellant had good

potential for rehabilitation and did not trust her because she worked with pilferable materials.[3]

ANALYSIS

The Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Here, the agency deciding official considered all of the relevant factors and, in our view, exercised management discretion within tolerable limits of reasonableness. As detailed below, we find that the administrative judge erred in mitigating the penalty.

First, we note that the Board and the Court of Appeals for the Federal Circuit have held that the de minimis nature of a theft may be a significant mitigating factor, where the

[3] The agency properly effected interim relief by restoring the appellant to work not on the date of the issuance of the initial decision, but after it had effected the 90-day suspension retroactive to the date of removal, August 12, 1991. *See Stevenson v. Department of Defense*, MSPB Docket No. SL07529110274, slip op. at 3-5 (Dec. 30, 1991). The interim relief was effective, therefore, on November 10, 1991. *See* Petition for Review File, Tab 1. In her response to the petition for review, the appellant contends that the agency charged her with two days of absence without leave (AWOL) on November 14-15, 1991, and that such action was an abuse of discretion. The appellant presents no evidence on this matter. Even assuming the truth of her allegation, however, AWOL by itself is not an appealable matter. *See* 5 C.F.R. § 1201.3; *Maki v. U.S. Postal Service*, 41 M.S.P.R. 449, 453 (1989), and cases cited therein.

The appellant has responded to the agency's petition but has not cross petitioned. Thus, we do not further consider the appellant's claim of handicap discrimination.

appellant otherwise has a satisfactory work and disciplinary record.[4] Under certain circumstances, however, mitigation is inappropriate even for de minimis theft. Mitigation has been found to be inappropriate when the item stolen is within the custody and control of an employee. *See, e.g., DeWitt v. Department of the Navy*, 747 F.2d 1442, 1445 (Fed. Cir. 1984) (employee who worked stocking shelves in commissary removed for taking $14.00 worth of groceries), *cert. denied*, 470 U.S. 1054 (1985); *Toone v. Veterans Administration*, 38 M.S.P.R. 262 (1988) (nurse's removal warranted for taking 10 Darvoset tablets); *Hunt v. U.S. Postal Service*, 29 M.S.P.R. 246 (1985), and cases cited therein (letter carrier discharged for removing uncanceled stamps).

In *DeWitt*, the Court specifically distinguished *Miguel v. Department of the Army*, 727 F.2d 1081 (Fed. Cir. 1984). The court stated that because DeWitt stocked the commissary shelves, the grocery items he stole were within his custody and control while, Miguel, who was a commissary cashier, was in a position of control with respect to cash but not with respect to the items she took from the salvage shelves in the commissary manager's office. *See DeWitt v. Department of the*

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[4] *See e.g., Miguel v. Department of the Army*, 727 F.2d 1081 (Fed. Cir. 1984) (removal not warranted for theft of soap worth $2.10); *Kelly v. Department of Health & Human Services*, 46 M.S.P.R. 358 (1990) (90-day suspension rather than removal the appropriate penalty where a GS-10 Claims Representative was convicted of off-duty shoplifting on two occasions); *Mallery v. U.S. Postal Service*, 41 M.S.P.R. 288 (1989), and citations therein (30-day suspension and not removal the appropriate penalty where Mail Handler shoplifted a kitchen knife at a grocery store).

Navy at 1447. The instant case is similar to *DeWitt* because there is no dispute that the items the appellant pilfered were items that she was responsible for loading and, thus, came within her custody and control. *See* HT at 13.

Further, we note that, while the appellant's performance appraisals were satisfactory, the deciding official testified at length concerning the appellant's problems over the last two to three years. She testified, *inter alia*, that she had counseled the appellant regarding sleeping on the job, attendance, loafing, and taking too many breaks. *See* HT at 9-11; 23. The deciding official also testified that she took action against the appellant's immediate supervisor because he was not performing his job, and that if he had been performing it correctly, the appellant would not have received a satisfactory performance rating. *Id.* at 24-25. In light of the uncontroverted testimony that there were performance problems, even though the appellant's performance ratings were satisfactory, we do not find that the satisfactory ratings weigh in favor of mitigation.

Additionally, we agree with the agency's assertion in its petition for review that there is no basis for concluding that the appellant was a good candidate for rehabilitation. The administrative judge did not explain his reasons for his findings that the appellant was remorseful and a good candidate for rehabilitation. *See* Initial Decision at 5. We find nothing in the record tending to show that the appellant was remorseful or able to rehabilitate herself. In fact, the

record evidence indicates the contrary. The appellant testified that she believed the agency was "blowing it [the theft] out of proportion," and answered "no" when asked if she had ever done anything like the theft before. *See* HT at 27-28. She then answered "no" to the question of whether she pled guilty to shoplifting in 1988; yet after further questioning, she admitted it reluctantly, saying "yes, if it's on there" [the record]. *Id.* at 29-30. Thus, while the appellant admitted to the theft prior to the hearing, in the absence of other evidence, we do not find that she was remorseful or necessarily a good candidate for rehabilitation. In so finding, we also note the deciding official's testimony that she had tried to help the appellant for several years, that she did not believe the appellant could be trusted, and that she did not believe the appellant should continue in her job where she had access to pilferable materials. *See* HT at 13-16.

Further, we note that the administrative judge correctly concluded that because the agency did not include the appellant's past disciplinary record, a reprimand and a suspension, in its notice proposing her removal, the agency deciding official improperly considered them in deciding to remove the appellant. *See Thompson v. U.S. Postal Service*, 50 M.S.P.R. 41, 45 (1991); HT at 13-14. We do not agree with the administrative judge, however, that the deciding official's erroneous consideration of the appellant's past record warrants mitigation. The appellant has not shown to date what

evidence or argument she would have proffered had she known that her prior past record was being considered in assessing the penalty, and how that evidence would have affected the reasonableness of the penalty. Moreover, on the record before us, without considering the past record, the penalty of removal is within the bounds of reasonableness. *See Clark v. Equal Employment Opportunity Commission*, 42 M.S.P.R. 467, 478 (1989) (agency deciding official's improper reliance on the appellant's past disciplinary record and subsequent erroneous reliance by the administrative judge constituted error, but the removal penalty was reasonable under all of the circumstances of the case). *See also Thompson v. U.S. Postal Service* at 45; *Edwards v. U.S. Postal Service*, 13 M.S.P.R. 471, 474-75 (1982). The only mitigating factors are the appellant's 15 years of employment, and the de minimis nature of the theft. We find that they are outweighed by the appellant's recent performance problems and the seriousness of the offense in light of her custody and control over the stolen items. Thus, we find no basis on which to disturb the agency's choice of penalty.

ORDER

This is the Board's final order in this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
PO Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.